BRB Nos. 03-0189
and 03-0189A

LARRY G. CARROLL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
M. CUTTER COMPANY, INCORPORATED	)	DATE ISSUED: Oct. 30, 2003
	)	
and	)	
	)	
LIBERTY NORTHWEST INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Meagan A. Flynn (Preston, Bunnell & Stone, L.L.P.), Portland, Oregon, for claimant.

John Dudrey (Williams Frederickson, L.L.C.), Portland, Oregon, for employer/carrier.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals and employer cross-appeals the Decision and Order (2001-LHC-00385) of Administrative Law Judge Jeffrey Tureck rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers= Compensation Act, as amended, 33 U.S.C. '901 *et seq.* (the Act). We must affirm the administrative law judge=s findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are

in accordance with law. 33 U.S.C. ' 921(b)(3); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The facts of this case are not in dispute. On December 4, 1998, claimant fell 30 feet from a crane boom walkway to the barge below when his safety harness failed. He sustained numerous serious injuries, including a closed head injury, fractures of his left wrist and arm, injuries to his cheek, skull, eye, and spleen, and hearing loss. Claimant=s head injury has resulted in cognitive impairment, especially affecting his short-term memory. Decision and Order at 2. The parties agree claimant is permanently totally disabled. *Id.* at 1; Tr. at 5. Due to the injury to claimant=s brain, his treating physician and the independent medical examiners all agree that claimant needs 24-hour supervision. Cl. Ex. 5 at 9, 15, 26; Cl. Exs. 12, 15-16.

The issue before the administrative law judge was whether employer must pay for supervision 24 hours per day.[1] Based on employer=s evidence, the administrative law judge held employer liable for fewer than 24 hours per day of paid attendant care. Decision and Order at 6. He also ordered reimbursement, at a rate of $10 per hour, to claimant=s family members for care they provided. *Id.* at 7-10. Claimant appeals, contesting the hours of paid supervision awarded and the commencement date of the award, and employer responds, urging rejection of claimant=s contentions. BRB No. 03-189. Employer cross-appeals, challenging the hours of paid supervision awarded, and claimant responds, urging the Board to reject employer=s argument. BRB No. 03-189A.

According to the evidence credited by the administrative law judge, claimant is capable of Aperforming the basic activities of caring for himself, such as eating, dressing, bathing, and toileting. He also has the mobility to get around his house and his neighborhood.@ Decision and Order at 3. Nevertheless, he needs 24-hour supervision for several reasons: he is not always aware of his surroundings; he becomes obsessed or distracted by a particular activity and puts himself in harm=s way; he sometimes gets lost; or, he forgets things (*e.g.*, to take his medicine or to exercise).[2] He also gets frustrated by his inability to do the things he did before. *Id.* The administrative law judge noted that claimant

[1]The administrative law judge also addressed issues involving a disputed dental bill and mileage reimbursement. Decision and Order at 10-11. Those findings have not been appealed.

[2]Claimant gained over 100 pounds after his injury because he would eat several times a day, having forgotten when he had previously eaten.

sleeps only a portion of the night. Decision and Order at 6 n.7. The uncontradicted testimony shows that claimant sometimes engages in unsafe activities when he wanders around the house at night, such as putting a kettle on the stove, turning on the burner, and then going to sleep. Cl. Ex. 39 at 95.

Dr. Carter, claimant=s treating physician, advised 24-hour Asupervision@ because of safety concerns due to claimant=s cognitive defects. Cl. Ex. 5 at 9. A nurse=s report from the caregiver agency, PSA, stated that as of June 13, 2000, claimant needed Aconstant protective supervision@ and he cannot be left alone. Cl. Ex. 5 at 26. The neurological, independent medical examiner stated that claimant needs 24-hour supervision due to significant memory difficulties, cognitive problems and safety concerns. Cl. Ex. 12. The reports from two independent medical examiners for head trauma advised 24-hour supervision. While one report indicated claimant might be safe at home alone for brief periods, it recognized that the problem is claimant=s impulsiveness and concluded that he needs Acontinuous supervision.@ Cl. Exs. 15-16.

Claimant and employer each hired a life-care planner to determine the needs of claimant and his family. Claimant=s expert, Dr. Rollins,[3] concluded that claimant needs a licensed, bonded, home care (live-in) attendant 24 hours per day and that this would cost approximately $105,000 per year. Cl. Ex. 37. In his deposition, Dr. Rollins stated that claimant does not grasp his limitations and he makes errors in judgment that often put him at risk. Cl. Ex. 40 at 9-10. Thus, he needs monitoring and oversight 24 hours per day. *Id.* at 10.

Employer=s expert, Ms. Bellerive,[4] performed an in-home assessment and concluded that claimant does not need a paid attendant 24 hours per day. Cl. Ex. 41 at 10. She compared claimant=s situation with a person who requires 24-hour nursing care because he cannot perform daily life functions. Thus, she determined that employer should not have to pay for 24 hours of care and that claimant=s family should take some responsibility for claimant=s care, as there are times when they would be with him anyway. *Id.* at 11, 19. Because claimant primarily needs reminding or redirecting, Ms. Bellerive concluded that his Asupervisor@ need not be a paid professional, but must be an Aastute human being@ with claimant=s Abest interest at heart,@ and that it could be his wife, another family member, or hired personnel. Cl. Ex. 35. While she recommended reimbursing claimant=s wife for her past services and giving her some respite from taking care of claimant, she did not believe employer should have to pay for times when his wife or family members would be with him anyway. *Id.* Consequently, Ms. Bellerive advised employer to pay for the following, at an

[3]Dr. Rollins is a rehabilitation consultant with a PhD.

[4]Ms. Bellerive is a certified life-care planner with a nursing background.

average rate of $20.50 per hour: an average of 14.5 hours of paid care five days per week; 48 hours of paid care one full weekend per month; and two full weeks per year of paid care for a vacation. Cl. Ex. 41 at 10, 14.

The administrative law judge gave greater weight to the opinion of Ms. Bellerive than to that of Dr. Rollins. He concluded that her opinion is well-reasoned and fair-minded and that she took into account the needs of claimant and his family more so than did Dr. Rollins. Decision and Order at 5. He also noted that Ms. Bellerive relied on the medical evidence and on the limited amount of care necessitated by claimant=s condition, and he identified claimant=s wife=s other activities and agreed that she deserved some respite from caring for claimant to attend to those activities. *Id.* at 5-6. Accordingly, the administrative law judge held employer liable for the following hours of paid attendant care: 10.5 hours five days per week while claimant=s wife works;[5] 20 hours of paid care spread over five days per week tailored to claimant=s wife=s needs (not to exceed six hours per day); 48 hours of paid care one weekend per month; and two full weeks per year of paid attendant care for vacation purposes. Decision and Order at 6. However, in addition to Ms. Bellerive=s recommendations, the administrative law judge awarded 16 hours of paid care each weekend where 24-hour care is not provided. *Id.* The administrative law judge emphasized that this is not a situation involving a claimant who cannot perform any daily functions, but, rather, one who needs reminders and safety supervision. Thus, the administrative law judge concluded that while claimant needs 24-hour supervision, he does not need 24-hour paid attendant care, and there is no justification for paying claimant=s wife or other family member to attend to him at night or when they are in the house together and able to provide minimal supervision without Asubstantial disruption to [the] quality of life.@ *Id.*

Section 7(a) of the Act, 33 U.S.C. ' 907(a), states:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

[5]Prior to the hearing, employer had provided paid care for 10.5 hours, five days per week while claimant=s wife was at work, as well as a few hours one night per month to allow her to attend her gardening club.

The phrase Aother attendance@ in Section 7(a) has been held to encompass certain essential domestic services that the claimant, due to his injury, can no longer perform. *Gilliam v. The Western Union Telegraph Co.*, 8 BRBS 278 (1978). Thus, long-standing Board law provides that an employer is liable for reasonable and necessary home care related to a claimant=s work injury. *Id.*; *Falcone v. General Dynamics Corp.*, 21 BRBS 145 (1988); *Timmons v. Jacksonville Shipyards, Inc.*, 2 BRBS 125 (1975); *see also Edwards v. Zapata Offshore Co.*, 5 BRBS 429 (1977); *Director, OWCP v. Gibbs Corp. [Elliott]*, 1 BRBS 40 (1974); 20 C.F.R. ' 702.412(b). The issue before us involves the specific number of hours of care for which an employer must pay.[6] We conclude that the administrative law judge erred in limiting employer=s liability to less than the 24 hours prescribed by claimant=s treating physician, and recommended without contradiction by the other medical examiners, in this case. *See Amos v. Director, OWCP*, 153 F.3d 1051 (9th Cir. 1998), *amended*, 164 F.3d 480, 32 BRBS 144(CRT) (9th Cir. 1999), *cert. denied*, 528 U.S. 809 (1999). Even Ms. Bellerive, on whom the administrative law judge relied, agreed that claimant needed someone to keep him safe 24 hours per day.

Initially, however, we address, and reject, employer=s assertion on cross-appeal that the administrative law judge erred in adding 16 hours of paid professional attendant care for each of the non-covered weekends of each month, above and beyond the time recommended by Ms. Bellerive. While the administrative law judge deferred to Ms. Bellerive=s recommendations for the majority of his award, nothing prevents him from awarding additional, paid attendant care based upon his reasonable inferences. Specifically, after considering testimony from claimant, his wife and three of his four daughters, all of whom have shared in caring for their father, the administrative law judge concluded that claimant=s family needed additional hours of paid attendant care. He reasoned that the family needs respite from watching claimant and that the additional paid attendant time is very important and would prevent major disruptions in the lives of the family members while still assuring the safety of claimant. Decision and Order at 6. The administrative law judge=s conclusions are within the realm of his discretionary authority, are rational, and are supported by the record. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Pozos v. Army & Air Force Exchange Service*, 31 BRBS 173 (1997). Therefore, we affirm the administrative law judge=s award of paid licensed care. *Falcone*, 21 BRBS 145.

---

[6]In *Falcone*, the employer challenged the finding that it was liable for claimant=s home care rather than the cost of placing the claimant in a nursing home. As the administrative law judge credited the opinion of claimant=s physician, who advised home care as being less disruptive, over employer=s expert, who recommended nursing home care, the Board held that the administrative law judge=s decision was supported by substantial evidence. *Falcone*, 21 BRBS at 147-148. It affirmed as unchallenged on appeal the administrative law judge=s determination that employer should pay for 18 hours per day of home care. *Id.* at 148.

As the administrative law judge=s award does not amount to 24 hours of paid supervision per day, we must next address claimant=s contention that the administrative law judge erred in denying claimant 24-hour paid care. Specifically, claimant asserts he is entitled to constant paid care, whether it means paying a hired professional or a competent family member. He argues that based upon Dr. Carter=s prescription of 24-hour supervision and the agreement among the other medical professionals that he needs 24-hour supervision he is entitled to 24 hours of paid care; thus, he asserts, the administrative law judge erred in addressing this issue in terms of claimant=s wife=s need for respite instead of relying on the care uniformly prescribed for him. We agree with claimant=s contention.[7]

[7]As claimant has sought 24-hour paid care since the inception of this case, and as claimant=s request included payment to either a paid professional or to a family member, we reject employer=s assertion that claimant did not preserve for appeal the argument that employer is liable for reimbursing the future services of claimant=s family members.

It is axiomatic that employer is responsible for reasonable and necessary medical care related to the work injury. 33 U.S.C. '907(a); *Amos*, 164 F.3d 480, 32 BRBS 144(CRT); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532 (1979); 20 C.F.R. '702.402. As stated previously, this medical care may include attendant and domestic services. *Gilliam*, 8 BRBS 278; *Timmons*, 2 BRBS 125; 20 C.F.R. ''702.412(b), 702.413. In this case, it is undisputed that all the doctors, including claimant=s treating physician, advised 24-hour supervision of claimant. While the administrative law judge rationally found, based on Ms. Bellerive=s report, that claimant does not need 24-hour paid licensed attendant care, it is nevertheless undisputed that claimant cannot be left alone.[8] As all doctors agree that claimant must be supervised 24 hours per day, it was improper for the administrative law judge to hold employer liable for less than 24-hour per day supervision. *Amos*, 164 F.3d 480, 32 BRBS 144(CRT). Moreover, he erred in determining the compensability of required services based on claimant=s wife=s need for respite rather than on the uncontradicted evidence regarding the care necessary for claimant=s condition.

As it is undisputed that claimant=s physician, as well as all other medical personnel who examined him, recommended he be supervised 24 hours per day, and as his need for supervision is the result of the work-related injury, the only conclusion which can be reached based on this record is that employer is liable for this prescribed 24-hour supervision.[9] *See generally Falcone*, 21 BRBS at 147-148. Further, while it is true that claimant=s family would naturally spend time with him, it is equally true that, given the extent of his injuries, claimant=s family must now remain alert at all times when they are with him. There is no evidence that claimant can safely go without supervision while his wife or other family members are sleeping. Under the administrative law judge=s order, family members are effectively substituting for a licensed, paid attendant. At any time when a family member

[8]Uncontradicted evidence of record reveals that claimant has used power tools and become distracted, nearly severing his fingers, that he has gotten lost and needed to rely on his five-year-old granddaughter to find his way home from the store, and that he does not remember to take his medications on a regular basis. Decision and Order at 3; *see* Emp. Exs. 2, 8; Tr. at 24-26, 52, 55-62, 67, 69.

[9]Although our dissenting colleague would classify this holding as improper fact-finding, our decision is based upon uncontradicted evidence of record. *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *Stancil v. Massey*, 436 F.2d 274 (D.C. Cir. 1970). Ms. Bellerive=s opinion supports the administrative law judge=s conclusion that claimant does not require 24 hour professional care. However, she concurred that claimant required 24-hour supervision and her view that some care could be provided by family members does not result in a holding that they must provide such services for free. The Act requires that employer provide necessary care, and her opinion that employer should not have to pay for supervision provided by claimant=s family cannot overcome the Act=s mandate or the uncontradicted medical opinions regarding claimant=s need for 24-hour care.

assumes responsibility for claimant=s supervision, that family member surrenders his right to come and go at will in order to provide the care for which employer is liable. As claimant=s family is providing the same type of services as the licensed attendant, it was improper for the administrative law judge to commandeer their services for free, regardless of their willingness to serve. Therefore, to the extent they are willing to perform the services employer is obliged to provide, claimant=s family members must be paid, albeit at a reduced rate.

In determining that employer is liable for reimbursing the family members for their services prior to the time employer paid for professional care, the administrative law judge found that the services of the family should be reimbursed at the rate of $10 per hour. He found that the licensed caregiver should be reimbursed at the rate of $20.50 per hour. As no party has challenged these findings, they are affirmed. Thus, in conjunction with our above holdings affirming the number of hours awarded for paid licensed care, employer also must pay for services rendered by claimant=s family to account for 24-hour coverage for supervising claimant. In no event, however, can employer=s liability for services exceed 24 hours per day.

Claimant also asks the Board to modify the administrative law judge=s decision to reflect the date claimant was discharged from the hospital, January 1, 1999, as the commencement date for paying his family members for services rendered. The prescription for 24-hour supervision from Dr. Carter, was dated February 25, 1999. In a letter dated March 3, 1999, employer stated it would not honor the prescription for home care without more information. On April 5, 1999, Dr. Carter responded to the letter, explaining the need and including the fact that the papers discharging claimant from the hospital recommended 24-hour supervision. Cl. Ex. 5 at 7, 9. As the administrative law judge found, however, the discharge papers are not included in the record; thus, the initial request for paid attendant care must be considered to have occurred on February 25, 1999. As employer can be held liable for necessary and reasonable treatment only after it has been requested, the administrative law judge=s determination commencing reimbursement of family care on February 25, 1999, is reasonable and is affirmed. *Pozos*, 31 BRBS at 177; *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989).

Accordingly, the administrative law judge=s denial of 24-hour paid supervision is reversed, and the award is modified to reflect employer=s liability for paid supervision for claimant for 24 hours per day, commencing on February 25, 1999. In addition to the paid professional services awarded by the administrative law judge, employer is liable for payment to the family members for their services, at the rate of $10 per hour, for the remaining hours of the day, not to exceed 24 hours per day. In all other respects, the administrative law judge=s decision is affirmed.

SO ORDERED.

_____

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

_____

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

While I agree with my colleagues= determination that claimant is not entitled to paid professional attendant care 24 hours per day, that the administrative law judge rationally included an additional 16 hours of paid professional care per non-covered weekend beyond Ms. Bellerive=s recommendation, and that employer=s liability for such care properly commenced on February 25, 1999, I respectfully dissent from their opinion that claimant is entitled to 24 hours of paid supervision.

In this case, the administrative law judge rationally found that while claimant needs 24-hour *supervision*, he does not need 24-hour *paid attendant care*. This is supported by the reports of the independent medical examiners and claimant=s own doctor. Claimant=s condition is very different from someone suffering total incompetence, and the administrative law judge made this rational distinction. In light of this, he found that employer must pay for claimant=s care for a portion of the time and claimant=s family should take responsibility for the remainder. The administrative law judge=s determination that supervision by claimant=s family members, who would be with claimant at various times anyway, is sufficient to provide the necessary care is reasonable and is supported by substantial evidence, specifically Ms. Bellerive=s opinion that the person watching claimant need not be a professional, but need only be Aastute@ and with claimant=s best interests at heart.

It is within the administrative law judge=s discretionary powers to determine how to credit and weigh the evidence of record, including the opinions of medical experts. *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22(CRT) (5th Cir. 1994); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Also, it is solely within his discretion to accept or reject all or any part of any testimony according to his judgment, *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The administrative law judge thoroughly considered the evidence of record and gave the greatest weight to Ms. Bellerive=s opinion. This opinion, as reflected in her report and testimony, constitutes substantial evidence supporting the administrative law judge=s conclusion that employer should not be required to pay for 24-hour supervision, as claimant, under the facts of this case, does not need 24 hours of paid supervision. The Board may not substitute its judgment for that of the administrative law judge when his interpretation of the evidence is rational and his conclusion is supported by substantial evidence based on the specific facts before him. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991); *Miffleton v. Briggs Ice Cream Co.*, 12 BRBS 445 (1980), *aff=d*, No. 80-1870 (D.C. Cir. 1981). Consequently, I would affirm the administrative law judge=s Decision and Order in its entirety.

_____

ROY P. SMITH
Administrative Appeals Judge